No. 87-643

In the Supreme Court of the United States

OCTOBER TERM, 1987

HAROLD U. REPP, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITIONER'S REPLY BRIEF

EUGENE R. FIDELL
(Counsel of Record)
JEFFREY K. STITH
EDWARD J. WALINSKY
Klores, Feldesman & Tucker
2001 L Street, N.W.
Washington, D.C. 20036
(202) 466-8960

COLONEL LEO L. SERGI
CAPTAIN HENRY J. SCHWEITER
Defense Service Division
Building 5683
Bolling Air Force Base
Washington, D.C. 20332
(202) 767-1562

Counsel for Petitioner

Of Counsel:

NORMAN L. GOLDBERG
406 West State St.
Media, Pa. 19063
MAJOR DAVID M. SCHNEIDERMAN
Ft. Meade, Md. 20755
MAJOR CHARLES L. WILLIE
Andrews Air Force Base, Md. 20335

JANUARY 1988

INDEX

TABLE OF AUTHORITIES

Cases:

Constitution and Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1987

HAROLD U. REPP, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITIONER'S REPLY BRIEF

ARGUMENT

Although respondent's opposition never acknowledges the point, the government had the burden of proving by a preponderance of the evidence that petitioner's expectation of privacy in his forearms is one society is unprepared to accept as reasonable.[1] That is a heavy burden where, as here, the part of the body in question is not one that is "constantly exposed to the public."[2]

1. Predictably,[3] respondent stresses that the military is a separate society. It fails, however, to show how that justifies the result *in this case.* Its claim rests on two notions: first, that clothing is carefully regulated in the mili-

[1] Mil. R. Evid. 311(e)(1), MCM, 1984, at III-9, provides that when a motion to suppress or objection has been made, "the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure." The rule is the same as the civilian rule. *See* Analysis of the 1980 Amendments to the Manual for Courts-Martial, MCM, 1984, at A22-16, *citing Lego v. Twomey*, 404 U.S. 477 (1972).

[2] *See United States v. Dionisio*, 410 U.S. 1, 14 (1973), *quoted in Cupp v. Murphy*, 412 U.S. 291, 295 (1973).

[3] *See* Pet. 10 & n.6.

tary, and second, that "the military requirements of obedience, discipline, and readiness necessarily limit the legitimate expectations of privacy of servicemembers." Opp. at 8-9.

a. This argument misconceives the issue, which is in no way peculiar to the military. Reasonableness must be tested by the clothing actually worn, and the individual's military or civilian status is immaterial. But even if military status were relevant, respondent does not contest the fact that petitioner's apparel was proper and lawfully worn in accordance with the pertinent uniform regulations. As a result, *Goldman v. Weinberger*, 475 U.S. 503 (1986), if anything, supports our case. While Congress has now superseded *Goldman*,[4] it is plain that a generally deferential approach to military matters survives, which in the context of this case requires recognition of the fact that petitioner's long-sleeved garment was in conformity with service requirements. Hence, even if it were proper to look past the simple fact of what petitioner was actually wearing, it is impossible, to conclude that his apparel was anything other than objectively reasonable and therefore entitled to Fourth Amendment protection.

b. As to respondent's sweeping claim based on "military requirements of obedience, discipline, and readiness," we can only say that it has failed to show how these broad interests dictate a result any different from what would have obtained if petitioner had been a civilian. The flightsuit was in accordance with regulations; its wearing involved no breach of discipline.[5] It is instructive that

---

[4] National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 508, 101 Stat. 1019. For floor debate on the provision see 133 Cong. Rec. S12791-801 (daily ed. Sept. 25, 1987).

[5] Uniform regulations are general orders violation of which is punishable by court-martial. UCMJ Art. 92(1), 10 U.S.C. § 892(1) (1982).

neither the trial judge (a military officer), R. 72, nor the military officers serving as appellate military judges on the Court of Military Review, Pet. App. 6a-8a, rested their determinations on these kinds of considerations, the latter court turning instead to a variety of civilian precedents from the state and federal courts.

2. The government also failed to carry its burden regarding petitioner's subjective expectation of privacy. It may claim that "petitioner manifested no subjective expectation of privacy in his bare forearms," Opp. at 10 n.10, but what an individual actually wears is the best evidence of his or her expectation of privacy of the body. People who wear long-sleeved garments need not carry a little card in their wallet (like those the police carry to help remember the *Miranda* warnings) or wear the legal equivalent of a "Med-Alert" bracelet certifying that they do not expect the police to be able to force them, without warrant or probable cause, to display their clothed arms, in order to protect against later being found to have had no subjective expectation of privacy.

3. In addition to erroneously implying that the burden lay on petitioner to prove that he had manifested his privacy expectations, respondent's assertion that petitioner did nothing to manifest his expectation of privacy is factually incorrect. No evidence was offered to suggest that petitioner was wearing the flightsuit against his will. What evidence there was showed that petitioner objected to being forced to display his clothed forearms. R. 37, 44. That objection, in addition to evincing a lack of consent to the search, was a demonstration of his privacy expectations and understanding of his rights. His mere ownership of short-sleeved shirts (not worn at the time of the search) or his lack of embarrassment (at times not relevant to the search) when wearing underwear among other males similarly clad[6] are simply not probative on the question of

[6] *See* Opp. at 10 n.10.

his personal, subjective expectation of privacy of his clothed forearms on the day and in the circumstances of the search.[7] That respondent would refer to these facts simply confirms our submission[8] that it, like the courts below, has mistaken *modesty* for *privacy*.

4. The government's opposition stresses that the search of petitioner's forearms occurred "in a *private* office with the door closed," Opp. at 4 n.2 (emphasis added); *see also id.* at 7, as if to imply that a Fourth Amendment violation may be forgiven if committed behind closed doors. To describe the room as "private" is misleading and misconceives the issue. The "private room" was an office

---

[7] Respondent has quarreled with our parenthetical summary of *United States v. Thomas*, 729 F.2d 120 (2d Cir.), *cert. denied*, 469 U.S. 846 (1984). *Compare* Pet. 16 n.25 *with* Opp. 10 n.10. Although Judge Meskill's opinion notes that the conditions of Thomas's parole "included consent to searches and inspections of his person and property by his parole officer," 729 F.2d at 123, this appears to have been mentioned not to show that the search was consented to, but rather for the point that Thomas has no subjective expectation of privacy in his forearms. *See id.* at 124-25 (Oakes, J., dissenting on other grounds). The majority also found that Thomas's expectation of privacy in his forearms was not objectively reasonable. *Id.* at 123-24. *Thomas*, however, is of no benefit to respondent since, whereas Thomas stated "I knew you were going to do that" when the parole officer told him to roll up his sleeves, *id.* at 123, petitioner made no such statement, and, as indicated in the text, there is no other basis on which to find that his subjective expectation of privacy was diminished.

This brief would be incomplete if it did not register a vigorous objection to the notion, Opp. at 10-11 & n.11, that for Fourth Amendment purposes military personnel whose task it is to *protect* our national liberties stand on an equal footing with paroled convicts. It is difficult to imagine an analogy that is at once more ironic, more insulting to those in service, or better calculated to discourage enlistments in this conscriptionless era.

[8] Pet. at 15, 19.

used by the Office of Special Investigations ("OSI"). The only sense in which it could be called "private" is that persons other than those involved in law enforcement presumably would not have been allowed in; any privacy interest would have been OSI's. Of course, keeping the door closed would reduce the embarrassment to petitioner from what it would have been if he had been forced to disrobe in a public place. But the fact that strangers to the law enforcement function could not observe what was bring done to petitioner scarcely excuses the injury to his privacy interest,[9] which OSI was violating just as much as if the Fourth Amendment violation had occurred at the intersection of Connecticut Avenue and K Street at noon on a workday. In other words, even if OSI's "private room" was intended as a sop to petitioner's modesty,[10] it was meaningless as a recognition of his Fourth Amendment rights.[11]

5. In an effort to breathe life into the Court of Military Review's stillborn conclusion that this was a search incident to an arrest, respondent now suggests that "petitioner was not formally placed under apprehension[12] until late" on the evening after the fore-

---

[9] *See Kirkpatrick v. City of Los Angeles*, 803 F.2d 485, 489-90 (9th Cir. 1986).

[10] To be realistic, it may also have been simply an OSI ploy to construct an environment in which the target's aloneness was underscored in hopes of eliciting his consent to a search that might otherwise have been resisted. If so, it failed; petitioner never consented.

[11] That OSI conducted this search in secret, rather than in a public place, makes it all the more disquieting from the standpoint of protecting citizens from police state tactics. The "knock on the door" is offensive because it typically comes in the dark of night, when disinterested persons who could bear witness to governmental illegality are unlikely to be present. Likewise, the chief evil associated with the Star Chamber was its secrecy.

[12] "Apprehension" is the military law term for "arrest." Pet. at 9 n.2.

arm search, Opp. at 3 n.1, implying—by use of the word "formally"—that an apprehension within the meaning of the Uniform Code of Military Justice had actually occurred some time earlier. This position constitutes a repudiation of the government's representations at trial,[13] and the Court should not permit itself to be thus lulled into thinking that the repeated descriptions of petitioner's status at the time of the forearm search as "detention" reflected merely looseness in terminology,[14] or that his *subsequent* "apprehension" was merely a needless ritual confirming a milepost that had already been passed. Both sides to this case were ably represented by lawyers at trial, and their careful, repeated references (as well as those of the experienced law enforcement personnel who equally carefully tailored their testimony) to *detention*, rather than *apprehension*, were no accident. Plainly, an arrest that did not occur until many hours later, and was overwhelmingly predicated on the fruits of the several levels of illegal search,[15] cannot be given effect *nunc pro tunc* so as to legitimize as incident to arrest a search occuring before arrest.

6. Finally, respondent's remarkable attempt to bolster its case with matter not adduced at trial, but rather at a pretrial investigation,[16] is entirely improper. The exhibit

---

[13] *See Pet. at 20, citing* R. 29 (prosecutor's expressed "total agreement" with defense counsel's proffer, subject to exceptions not here relevant), 31 (prosecutor's description of parties' positions as a "stipulation"). A change of signals such as this is a denial of due process because petitioner has not been afforded an opportunity to present evidence to meet the government's new theory. A remand for this purpose should not be permitted because the government has shown no basis for excusing it from the strategic choices the prosecutor made at trial.

[14] *See* Pet. at 20 (collecting record references).

[15] *See id.* at 12 (Steps 3-7).

[16] Opp. at 5 & n.5.

on which respondent now relies is a summary of testimony during an "Article 32 investigation."[17] The paraphrased testimony was neither given or offered at trial, and the summary itself is merely an attachment to the record.[18] Under Rule 804(b)(1) of the Military Rules of Evidence, testimony from a pretrial investigation cannot be used at trial unless (a) the witness is unavailable and (b) the prior testimony has been recorded verbatim. The summary referred to in footnote 5 of respondent's opposition meets neither of these two requirements.[19] It is far too late for the government now to be adding matter that was not placed in evidence before the military judge. *United States v. Glass*, 744 F.2d 461 (5th Cir. 1984) (per curiam) (refusing to take judicial notice of DEA agent's search warrant affidavit that was never before district court during sup-

---

[17] 10 U.S.C. § 832 (1982). The exclusionary provisions of the Military Rules of Evidence do not apply to such investigations. M.R.E. 1101(d); R.C.M. 405(i). The investigating officer may inquire into the legality of a search, and is encouraged to note problems of admissibility in his report, but is not required to consider such matters except as he or she deems necessary to an informed recommendation. R.C.M. 405(e) (Discussion). An investigating officer cannot enter a binding suppression order.

[18] *England v. Gebhardt*, 112 U.S. 502, 506 (1884). The difference is critical. Under R.C.M. 1103(d)(3)(A)(i), a report of investigation is "attached" to the record of trial if it is *not* used as a trial exhibit. The report in this case is an exhibit only to the investigating officer's report to the convening authority; it was not an exhibit at trial. Such documents are referred to as "allied papers," *see United States v. Buswell*, 22 M.J. 617, 619 n.5 (A.C.M.R. 1986) (per curiam), and are attached merely to demonstrate procedural regularity. R.C.M. 1103 carefully distinguishes between the "contents" of the record of trial (subparagraph (b)(2)) and "[m]atters *attached to* the record" (subparagraph (b)(3)) (emphasis added).

[19] Special Agent Roberson was obviously not unavailable; he testified at trial. R. 99-131.

pression hearing); *see also United States v. Donsky*, 825 F.2d 746, 749 (3d Cir. 1987).[20]

---

[20] Cf. *Stone v. Powell*, 428 U.S. 465, 473 n.3 (1976); *Spinelli v. United States*, 393 U.S. 410, 413 n.3 (1969); *Aguilar v. Texas*, 378 U.S. 108, 109 n.1 (1964) ("[i]t is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention") (emphasis in original). The Court of Military Appeals has correctly held that, over objection, matter from an Article 32 investigation may not be relied on to an accused's detriment *Compare, e.g., United States v. McCarthy*, 2 M.J. 26 (C.M.A. 1976), with *United States v. Talavera*, 8 M.J. 14, 17-18 (C.M.A. 1979); *see also McDonald v. United States*, 205 Ct. Cl. 780, 507 F.2d 1271, 1274-76 (1974) ("only way" Art. 32 report may be used by Court of Military Review "is to provide mitigating information for sentence reduction purposes"). Since this is the first time the government has attempted to rely on the summarized investigative testimony to petitioner's detriment, this reply brief represents petitioner's first opportunity to object, which he hereby does. In any event, the new matter belatedly relied on by respondent, along with the evidence that was put before the trial court, still would not amount to probable cause to arrest petitioner. *See generally* Pet. at 19-21. If it did, the prosecutor would have so argued to the proper time, *i.e.*, the suppression hearing at trial.

CONCLUSION

For the foregoing reasons and those previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE R. FIDELL
(Counsel of Record)
JEFFREY K. STITH
EDWARD J. WALINSKY
Klores, Feldesman & Tucker
2001 L Street, N.W.
Washington, D.C. 20036
(202) 466-8960

COLONEL LEO L. SERGI
CAPTAIN HENRY J. SCHWEITER
Defense Service Division
Building 5683
Bolling Air Force Base
Washington, D.C. 20332
(202) 767-1562

Counsel for Petitioner

Of Counsel:

NORMAN L. GOLDBERG
406 West State St.
Media, Pa. 19063
MAJOR DAVID M. SCHNEIDERMAN
Ft. Meade, Md. 20755
MAJOR CHARLES L. WILLIE
Andrews Air Force Base, Md. 20335

JANUARY 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1987 — 202-037/62021